No. 13103

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND LEE ARENAS, APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES AND LEE ARENAS

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OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 67–74. The opinion of this Court on a prior appeal is reported at 181 F. 2d 62. This Court's opinion on a prior appeal in the companion case of *United States and Eleuteria Brown Arenas* v. *Preston et al.*, presently pending on appeal as No. 12962, is reported at 181 F. 2d 69.

JURISDICTION

This suit was originally brought under the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345,[1] to determine an Indian's right to certain allotments. After judgment was entered for the Indian, his attorneys filed a petition in the case for a supplemental decree making an allowance for attorney fees and expenses and imposing a lien upon the allotments to secure payment thereof. Upon appeal, this Court affirmed the jurisdiction of the district court to fix attorney fees, impose a lien and sell the allotted lands, but reversed and remanded the case with instructions as to the proper manner to fix the fees. A judgment fixing fees was entered April 6, 1951 (R. 75–80). Motions for a new trial and to amend findings of fact, conclusions of law and judgment were filed on April 16, 1951 (R. 80–83) and denied on May 22, 1951 (R. 83–87). Notice of appeal was filed July 20, 1951 (R. 87–88). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether it is appropriate, under the circumstances of this case, that this Court reexamine its prior holding that in a proceeding under the 1894 Act, brought by an Indian to determine his right to

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[1] The jurisdictional provisions of this Act were incorporated in the Judicial Code, sec. 24 (24), 28 U. S. C. sec. 41 (24) (1940 ed.), which was identical in scope with the 1894 Act as amended. *First Moon* v. *White Tail*, 270 U. S. 243, 245 (1926). They are now codified in 28 U. S. C., sec. 1353. For brevity these provisions will be hereinafter referred to as the 1894 Act.

certain allotments, the district court had jurisdiction to impress a lien upon the restricted allotments to secure payment of an award of attorney fees and expenses of suit, and to enforce such lien by ordering a sale of the property.

2. Whether the values found by the district court for the Indian's interest in the various parcels of the allotments are excessive and not supported by competent evidence.

3. Whether the district court erred in denying the motion to amend findings of fact, conclusions of law and judgment to provide for attorney fees measured by a percentage of the value of the allotments up to but not exceeding the amount awarded.

STATUTE INVOLVED

The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C., sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within

> their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

STATEMENT

This is an appeal from a judgment (R. 75–80) awarding $90,000 as fees to the attorneys who represented an Indian in a suit under the 1894 Act to adjudicate his claim to allotments, and imposing a lien upon the allotments to secure the payment of the award.[2] The judgment was entered after further proceedings directed by this Court. *Arenas* v. *Preston,* 181 F. 2d 62 (C. A. 9, 1950). The background may be outlined as follows:

As a result of litigation which culminated in this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730 (C. A. 9, 1946), certiorari denied 331 U. S. 842, it was determined that Lee Arenas was entitled to trust patents for certain allotments, totaling 94 acres, in Palm Springs, California. On October 24, 1947,

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[2] The judgment also awards $258.67 as reimbursement for expenses of the litigation advanced by appellee attorneys (R. 76–77). On this appeal no question is raised as to this portion of the judgment except insofar as the $258.67 is made the basis for the lien impressed upon the allotted lands.

appellees filed in the allotment proceeding their petition for a supplemental decree for attorney fees and expenses incurred, the impressment of a lien on the allotments to secure the payment thereof, and other relief (R. 3–14). On the same day an order was issued directing Lee Arenas to show cause why the relief sought should not be granted (R. 14–15). The United States, appearing specially, moved to dismiss the show cause order insofar as it and the underlying petition were directed toward the issuance of any order affecting in any way the restricted allotment or the management thereof, on the grounds that, since title to the lands was in the United States, it was an indispensable party and had not consented to such jurisdiction (R. 16–18). On December 31, 1947, the motion to dismiss was denied (R. 27). Thereafter, the United States, appearing specially on its own behalf and generally on behalf of Lee Arenas, filed an answer (R. 28–39), alleging its governmental interest in the enforcement of the restrictions against alienation of the allotments (R. 28–29), and praying that, if appellees were entitled to any relief, it be limited to a personal money judgment against the Indian (R. 38).

After trial, the court (Judge Mathes) on March 31, 1948, rendered its oral ruling (R. 378–386), and on May 3, 1948, filed its findings of fact, conclusions of law and judgment (R. 47–62), awarding to appellee attorneys 22½% of the value of the allotments as fees, and impressing a lien upon the allotted lands to secure payment of the award. The United States appealed on behalf of itself and Arenas, raising the

issue as to the court's jurisdiction to impress a lien upon the restricted lands to secure the payment of compensation to the attorneys. This Court affirmed the jurisdiction of the district court to impress a lien upon the allotted lands. *Arenas* v. *Preston,* 181 F. 2d 62, 63–67 (C. A. 9, 1950). However, in view of the interest of the United States in the trust patent allotment, it was held to be reversible error that the court had fixed the compensation due to the attorneys in terms of a percentage of the value of the allotments unrestricted by any interest of the United States. *Arenas* v. *Preston,* 181 F. 2d 62, 67 (C. A. 9, 1950); *United States* v. *Preston,* 181 F. 2d 69 (C. A. 9, 1950). In so holding this Court stated (181 F. 2d at pp. 67–68):

> The district court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien and in so doing should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration.

and remanded the case "with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed," the judgment to stand affirmed when such determination is made, except as to proper assignments of error which may be claimed to have occurred in the determination ordered. A petition for a writ of certiorari filed by the Government and Arenas was denied

(*United States* v. *Preston,* 340 U. S. 819 (1950)), and the case came before the district court for further proceedings in February, 1951.

At the further proceedings it was stipulated that all the evidence introduced in the allotment proceeding and at the first hearing on attorney fees should be deemed as being before the court (R. 129, 388–389, 393), and in addition thereto further testimony was presented. The evidence as to the value of the allotments may be summarized as follows:

The allotments consist of Lots 46 and 47, each containing two acres, in Section 14; Lots 39 and 40, each containing five acres, in Section 26; and two parcels of 40 acres each in Section 26 (R. 77–78). All these lots and parcels are surrounded in whole or in part by lands allotted in severalty to other members of the Palm Springs tribe (R. 392, 549–550, 627–628). In 1949, Congress enacted legislation making all the Indian lands in the City of Palm Springs subject to the municipal zoning regulations (R. 652). Section 14 is surrounded by sections (Sections 11, 13, 15, and 23) having such major developments as the business district, hotels, apartment houses, estates and luxurious homes, municipal buildings, race track, golf course, and tennis club (Petitioners' Exhibit No. 14, p. 9). It is made up entirely of Indian lands and is uniformly described as a slum area because of its poor development (R. 159, 580–581, 610–611; Petitioners' Exhibit No. 14, pp. 8–9). Streets running through the section are no more than dirt paths, and the Indians have leased the lands to persons of low income

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who have erected shacks in a helter-skelter fashion without even regard to street lines (R. 574, 580–581, 611; Petitioners' Exhibit No. 14, pp. 8–9, 26). Although water and other utilities are available to the section, the Indian lands have no sewerage system and the sanitation facilities are faulty (Petitioners' Exhibit No. 14, pp. 7, 8, 16). Lots 46 and 47, allotted to Arenas, are located on a dirt road, and each contains about 12 shacks (R. 580–581). They are at least one-quarter of a mile from any street in an area zoned for commercial use (R. 415–416), and are themselves zoned for single family residences costing from $15,000 to $25,000 on lots of 7,500 square feet (R. 163–164; Petitioner's Exhibit No. 14, pp. 7, 17).

Section 26 is largely undeveloped, but is surrounded on three sides by well developed sections (Petitioners' Exhibit No. 14, pp. 9, 10). The two 5-acre parcels allotted to Arenas have a frontage of 660 feet on Palm Canyon Drive, a main thoroughfare, across the street from a high-class residential subdivision (R. 585, 587). They are now utilized for small cabin sites, trailer parks and cheap shacks, owned by tenants, and have no defined street system (R. 583–584, 612–613). They are presently zoned for single family residences on lots of 10,000 square feet for a depth of 150 feet from Palm Canyon Drive, and for use as a trailer park for the balance of the acreage (R. 613; Petitioners' Exhibit No. 14, p. 17). The remainder of the alloted lands in Section 26 (80 acres) is classified as raw desert acreage, subject to floods, of which approximately 30 acres are zoned for

trailer park use, while the balance of 50 acres is zoned for guest ranch use (R. 615–616; Petitioners' Exhibit No. 14, p. 17).

As in the companion case of *United States and Eleuteria Brown Arenas* v. *Preston, et al.,* No. 12962, there was a difference of opinion as to whether the allotted lands should be valued with or without regard to the restrictions against alienation (R. 154–156, 172–173, 184–186, 194, 388, 391). Appellees' witness, Joseph A. Gallagher, estimated that the fee value of the lands was $1,047,000 on the basis of a valuation of $20,000 per acre for the lots in Section 14, $13,200 per acre for the 5-acre lots in Section 26, and $12,000 per acre and $9,500 per acre for various parts of the remaining 80 acres in Section 26 (Petitioners' Exhibit No. 14, pp. 1–2, 15). This estimate was made on the assumption that the property was free from the restrictions against alienation (R. 154–156, 400–401, 406–407). It was his opinion that the trust patent interest of the Indian would have the same value if the trust were to expire in 1952, but that if the President had the power to extend the trust period for 10 years or longer, the value of the trust patent interest would be 40% less than the value of the fee or approximately $628,200 (R. 184–186, 194). His appraisal was made in December of 1947, and he had not returned to the Palm Springs area to make any appraisals since that time (R. 636, 637). On being recalled for cross examination at the second trial in February 1951, he testified that his opinions as to

values in 1951 would be the same as those expressed in his 1947 report (R. 429, 438).[3]

Gallagher reached his opinions as to the values of the various parcels by a process of averaging the values of lands in adjoining sections (R. 116–117, 424, 641, 649–651; Petitioners' Exhibit No. 14, pp. 19–20, 22), that is, he first determined values for all properties, chiefly small lots, in the well-developed sections adjacent to the Indian sections, added the values for properties in the sections to obtain the total value of each section, divided the sum of the section values to obtain the value of an average section, discounted such average value to obtain the value of the Indian sections, and then divided this result by 640 to get the average value per acre in the Indian sections (Sections 14 and 26). In determining the values of the individual properties in the adjoining sections Gallagher multiplied the assessed valuations of land and improvements by five and combined these values with some selling prices and listings (R. 174–177, 640–641). And in estimating the value of Lots 46 and 47 in Section 14, he assumed not only that these lots would be free of restrictions, but also that all the lands in the section would be similarly without restrictions against alienation and that the unsightly conditions would be cleaned up so that the section could be developed along the lines in the adjoining sections (R. 154–162, 167, 411–412, 413–415).

[3] At the first trial in 1948, Gallagher had testified that in his opinion values would be 28% less in 1952 because of an apparent leveling in real estate values (R. 188–189; see Petitioners' Exhibit No. 14, p. 12).

He also assumed that variances would be made in the zoning regulations to permit the highest and best use of the land (R. 165–166, 408, 421). He could not cite an instance of the sale of acreage in the Palm Springs area to support his valuations of the various parcels in the allotments at from $9,500 to $20,000 per acre (R. 177–181, 426–428), and he could only refer to an offer to sell some acreage in Section 11 at $6,500 per acre, which offer the potential purchaser refused to accept (R. 181).

At the first trial appellees also presented Benton Beckley as a valuation witness (R. 196–204). He had collaborated with Gallagher in the preparation of the appraisal report (Petitioners' Exhibit No. 14) and agreed that the reasonable market value of the allotted lands was $1,047,000 (R. 198). He had the same opinion as to the effect of the trust patent on value (R. 199), and in arriving at his estimates used the same "average" approach with assessed valuations as the basis (R. 199–200). He also assumed that the Indian lands could be used for business purposes (R. 201). He likewise could not cite any sales of acreage to support his valuations of the allotted lands, but could only refer to an offer to sell acreage at $7,000 per acre (R. 202–204). This witness did not testify at the second trial.

At both trials appellants moved to strike the valuation opinions of Gallagher and Beckley because of their reliance upon improper considerations, erroneous assumptions, and artificial mathematical computations (R. 40–41, 63–65). These motions to strike were denied (R. 66, 214), the court being of the

opinion that appellants' objections went to the weight rather than the admissibility of the opinions (R. 210, 211–214).

Appellants also presented two expert witnesses on valuation, Bernard G. Evans and Donald C. Jones. Evans, who did not testify at the second trial, estimated that in 1948 the fair market value of the fee title of the allotments was $211,500, based upon valuations of $6,250 per acre for the lots in Section 14, $30 per front foot for the street frontage and $6,000 per acre for the balance of the 5-acre lots in Section 26, and an average of $1,500 per acre for the remaining 80 acres in Section 26 (R. 604–605, 611, 613–614, 616–617). In his opinion the market value of the Indian's interest in the lands under the trust patent would not exceed 25% to 30% of the value of the fee, or a maximum value of $63,450 (R. 606).

At the first trial, Jones estimated that as of 1948 the market value of the fee title to the allotments was $245,000, based upon valuations of $6,400 per acre for the lots in Section 14, $8,000 per acre, or $35 per front foot and $7,350 per acre for the balance, for the 5-acre lots in Section 26, and an average of $1,750 per acre for the remaining 80 acres in Section 26 (R. 575–576, 587–588). In his opinion the value of the Indian's interest under the trust patent in 1948 would be 20% of the fee value, or $50,000 (R. 594–595). At the second trial, he estimated that the value of the trust patent in 1948 would be $87,800, the increase being due to increases in his trust patent valuations for the lots in Section 14 and the 5-acre lots in Section 26 because of the possibility of leasing

the lands without a 30-day cancellation clause (R. 433, 436). In his opinion the values in 1951 at the time of the second trial for both the fee title and trust patent title would be approximately 10% less than the 1948 values because of a falling off in the real-estate market in Palm Springs (R. 436–438).

On February 16, 1951, the court orally fixed the attorney fees at $90,000 (R. 67), and on April 5, 1951, filed findings of fact, conclusions of law and judgment (R. 67–80).[4] The court found (Finding IX, R. 71) that the reasonable market value of the fee simple title of the allotments was the same as the reasonable market value of the Indian's interest in the allotted lands, and that (Finding VIII, R. 70–71) the reasonable market value of the Indian's interest in the allotted lands under the trust patent was $412,000.00. The separate values found for the 2-acre lots in Section 14 and the 5-acre lots in Section 26 were exactly the same as estimated for these parcels by appellees' witness Gallagher (R. 70–71; Petitioners' Exhibit No. 14, p. 15). The judgment provided that payment of the fees awarded would be secured by a lien upon the allotted lands, including "the entire interest, if any, in said lands in the hands of the United States of America" (R. 77), and that, if payment was not made within six months, the lands were to be sold under court order (R. 78–79).

On April 16, 1951, appellants filed a motion for new trial, and in the alternative a motion to amend findings of fact, conclusions of law and judgment to pro-

[4] Although filed on April 5, 1951, the judgment was not entered until April 6, 1951 (R. 80).

vide that, in lieu of an award of $90,000, the compensation of appellee attorneys be fixed at "a sum equivalent to 22½ percent of the reasonable value of the plaintiff's interest and estate in the allotted lands under the trust patent * * * up to, but not exceeding, the sum of $90,000" (R. 80–83).[5] On May 22, 1951, these motions were denied (R. 83–86), the denial of the motion to amend findings, etc., being on the ground that under this Court's mandate the court had no power to make the requested amendment over the objection of appellees (R. 85–86, 457–458, 459, 462). This appeal followed (R. 87–88). On October 1, 1951, appellees' motion to affirm the judgment was denied.

SPECIFICATIONS OF ERROR

On this appeal, appellants rely upon the following specifications of error (see R. 88–90, 656):

1. The district court erred in assuming jurisdiction to impress a lien upon the restricted allotments to secure the payment of attorney fees and expenses of suit, and to enforce such lien by ordering a sale of the property.

2. The values found for the Indian's interest under the trust patent in the various parcels of the allotments (Finding VIII, R. 70–71) are excessive and not supported by competent evidence. This speci-

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[5] The original award of attorney fees, which was reversed by this Court, was in the amount of 22½% of the value of the allotted lands (R. 59–60), with no finding as to the land value. The present award of $90,000 is the rounded off equivalent of 22½% of the land value of $412,000 found by the court (R. 71), i. e., 22½% of $412,000 equals $92,700.

fication depends in part upon Specifications Nos. 3, 4, 5, and 6.

3. The finding (Finding IX, R. 71) that the value of the fee simple title to the lands involved was the same as the value of the Indian's interest therein is not supported by the evidence and is contrary to the evidence in the case.

4. The district court erred in basing the award of compensation upon the market value of the full fee title to the lands involved rather than upon the market value of the Indian's interest therein. This question as to whether the value of the fee title or the value of the trust patent interest should be considered in the determination of attorney fees was presented at both hearings. At the first hearing it was raised as follows during cross-examination of appellees' witness Gallagher (R. 155–156):

> Q. (By Mr. Brett). In other words, you did not give consideration to the fact that that particular property, as well as the other parcels which are the subject matter here, are vested in the United States of America and that there are very definite legal restrictions upon either conveyance or encumbrance of the property?
>
> Mr. Clark. Just a minute. I desire to interpose an objection to that question upon the ground that it assumes that the title is in the United States of America.
>
> The Court. Sustained. Did you assume that your hypothetical buyer would acquire an unimpaired fee simple title to the property?
>
> The Witness. Yes, sir.

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Mr. Brett. Did I understand your Honor sustained the objection?

The Court. I sustained the objection to the question. I think the witness has testified to what you want to know. He says that he assumed that this hypothetical buyer would acquire an unimpaired fee simple title to the land. I take it that throughout we are dealing with the full ownership, aren't we?

The Witness. Yes, sir.

The Court. That is what you dealt with?

The Witness. Yes, sir.

and at R. 172–173:

The Court. Mr. Brett asked some questions yesterday to which I sustained objection due to the form of the question, without suggesting they could be reached in another manner. I had in mind asking Mr. Gallagher if his opinion would be different if he assumed that there was such a trust patent.

Mr. Brett. I expect to go into that, your Honor.

The Court. Very well.

Mr. Brett. However, of course, I do not want to preclude in any way the court's questioning.

The Court. No. I just wanted you to know that I was not precluding that type of cross examination in my ruling.

And the court itself questioned Mr. Gallagher as to the effect of the trust patent on his estimates of value (R. 184–185).

At the beginning of the second trial in discussing the decision of Judge Cavanah in the *Eleuteria*

Arenas case (No. 12962) the following occurred (R. 388):

> The COURT. Do you gentlemen feel that Judge Cavanah properly complied with the mandate?
>
> Mr. BRETT. Unfortunately, the Government would have to answer "No," your Honor.
>
> The COURT. Is that because of the valuations or the amounts?
>
> Mr. BRETT. In applying the mandate, we feel that he erred in that it is quite apparent from his opinion that in valuing the land, he evaluated it as fee simple, as distinguished from valuing the Indian's interest.
>
> Mr. PRESTON. It is our contention that that is the only criterion, your Honor.

And at R. 391, Mr. Brett stated:

> In connection with this legal issue which Judge Cavanah has resolved and which your Honor will have to resolve, I believe that we have treated that in the memoranda and I do not want to take any additional time to argue the point.
>
> My purpose will be this, your Honor: I have Mr. Jones here and I expect to interrogate him on the value of the Indian's interest with a hypothetical question on one of two bases. If Judge Preston objects to that and your Honor rules against the Government that it is not admissible, then I would like to adduce it as an offer of proof so I will have the record.

And at the close of the hearing appellants moved to strike the opinion of Gallagher as to the market value in fee of the allotted lands in part on the

grounds that the fee value was immaterial, irrelevant, and incompetent (R. 63–64). This motion was denied (R. 66).

5. The court erred in denying the motions to strike the opinions of value expressed by petitioners' witnesses Gallagher and Beckley (R. 40–41, 63–65). At the first hearing the motion (R. 40–41) was addressed to the opinions of both Gallagher and Beckley and was on the ground "that both of said witnesses have inextricably included within the matters upon which they based their said opinions, certain matters which were wholly incompetent and inadmissible for such purpose, to wit:

> 1. The use of the assessed value as evidence of market value;
>
> 2. The use of the assessed value of the land and improvements indiscriminately as evidence of market value;
>
> 3. The use of an artificial mathematical calculation (multiplying assessed value by 5) as evidence of market value;
>
> 4. The total ignoring of zoning restrictions which, by law, would prevent use of the subject properties for business purposes, by assuming as an integral part of their basis for their opinions as to market value, alleged comparable properties which were zoned for business;
>
> 5. That in arriving at said opinions as to market value, each of said witnesses fixed such value upon the basis of an adaptability for use for which said properties were not then available and which use was then prohibited by law.

This motion was denied (R. 214). The entire reporter's transcript of the first hearing was considered as

given before the court at the second hearing (R. 388–389) and the hearing was treated as not having been interrupted by the prior appeal (R. 393). Beckley did not testify at the second trial and the motion to strike (R. 63–65) was addressed to the opinions of Gallagher only. This motion was made on the same ground as the previous motion, and in addition on the grounds that the market value of the fee simple title was immaterial, irrelevant and incompetent (R. 64–65). This motion was denied (R. 66).

6. The court erred in denying the Government's motion for new trial made on the grounds that the evidence was insufficient to justify the findings and that there were errors of law (R. 80–81).

7. The court erred in denying the Government's alternative motion (R. 81–83) to amend findings of fact, conclusions of law and judgment to provide for recovery measured by a percentage of the value of the allotment, up to but not exceeding the sum awarded.

SUMMARY OF ARGUMENT

I

Although this Court's prior holding that the district court had jurisdiction to impose a lien upon the restricted allotment is law of the case, there is no restriction upon this Court's authority to review the holding. *United States* v. *Fullard-Leo*, 156 F. 2d 756, 757 (C. A. 9, 1946), affirmed, 331 U. S. 256 (1947). Under the circumstances, and in view of new considerations advanced here for the first time, review is appropriate.

On the prior appeal in this case it was recognized that no lien could be impressed upon the allotment unless Congress had in some way indicated its consent thereto, and in reliance upon *United States* v. *Equitable Trust Co.,* 283 U. S. 738 (1931), and the principle that legislation must be construed most favorably to the Indian, it was held that such consent had been granted by implication. But just as in the case of any other special jurisdictional act waiving the sovereign immunity, a jurisdictional act for the benefit of Indians "is to be strictly construed and may not by implication be extended to cases not plainly within its terms." *Klamath Indians* v. *United States,* 296 U. S. 244, 250 (1935). Moreover, it is plain that the circumstances here present could not justify a finding of implied consent. In addition to those circumstances enumerated in our brief on the prior appeal, which we believe prevent any finding by implication that Congress had intended by the 1894 Act that attorneys should be compensated out of the restricted allotments, it may be pointed out that in numerous analogous situations involving allotments of the Five Civilized Tribes, Congress has passed special legislation denying to attorneys any lien upon the Indian lands, and has made other provisions for their compensation. Likewise, in cases arising under the 1894 Act Congress has not hesitated to make arrangements for compensating attorneys. These instances, rather than indicating any consent that the allotments be subject to a lien enforceable by the courts, demonstrate that Congress has re-

tained in itself full control over the disposition of the Indian lands.

II

It is apparent from the findings of the court that the amount of attorney fees was determined in consideration of the fee simple value of the allotted lands rather than the value of the Indian's interest therein under the trust patent, which in itself is a more liberal measure of compensation than the equities demand. Although the witnesses were in agreement that the value of the trust patent interest was at least 40% less than the value of the fee title, the court found that such values were the same. Thus, the court's findings as to the value of the Indian's trust patent interest are actually findings as to the fee value.

The findings as to the value of the 2-acre and 5-acre lots can be supported only by the highest testimony as to their fee value, which is admittedly substantially greater than the trust patent value. Hence, it is plain that these findings are erroneous and that the award of fees based thereon must be reversed. Although the findings as to the value of the 80-acre parcels are within the range of the testimony, these findings, as well as the findings as to the 2-acre and 5-acre lots, are subject to attack on the ground that the only evidence which can support the findings was incompetent and should have been stricken on appellants' motions. The only evidence which can be said to support the findings were opinions based upon a process of averaging values

of small lots in adjoining, well-developed sections to obtain an average price per acre for land in the Indian sections. In determining the values of the lots in the adjoining sections the witnesses relied chiefly upon assessed valuations of land and improvements and listings. Plainly, opinions based upon such incompetent factors and an arbitrary method of averaging are of no probative value and should not have been considered. Moreover, these witnesses assumed not only that the lands in question would be without restrictions against alienation, but also that all other lands in the Indian sections were similarly free of restrictions and available for development similar to that in the adjoining sections. They also assumed that variances in the zoning regulations would be made to permit the highest and best use of the land, i. e., for business and multiple-dwelling use rather than only for single family dwellings, as presently zoned. Clearly, such considerations vitiate their opinions.

III

In this case the range of the valuation testimony was unusually wide, and the findings as to value as to some of the parcels were in the exact amount of the highest testimony, the findings as to the other parcels being substantially greater than appellants' testimony. Therefore, because of the possibility that the proceeds of a sale would be exhausted after payment of the expenses of sale and the award of attorney fees, leaving little or nothing for the Indian, appellants filed a motion to amend the findings of

fact, conclusions of law and judgment, to provide for an award in the alternative, i. e., either $90,000 or 22½% of the value of the lands, whichever was the lesser. The district court was impressed by the equity of the proposed amendment, but denied the motion on the ground that under this Court's mandate the court below had no power to grant the relief sought. It is submitted that this Court's mandate should not be so construed, and that in any event this Court has the power to grant the relief. There can be no question as to the equity of the proposed amendment.

ARGUMENT

I

Under the circumstances of this case, it is appropriate that this court reexamine its holding that the district court had jurisdiction to impress a lien upon the restricted allotments to secure the payment of attorney fees and expenses of suit, and to enforce such lien by a sale of the restricted property

On the prior appeal in this case, this Court held that, by virtue of the general equity jurisdiction of the court below, the restricted allotments could be impressed with a lien to secure the payment of attorney fees and necessary expenses of the litigation (*Arenas* v. *Preston,* 181 F. 2d 62, 63–67 (C. A. 9, 1950)). This decision constitutes the "law of the case." However, an undersanding of the issues as to the amount of the fees awarded requires an understanding of the ground upon which any award is justified. In that connection, while we will not, of course, repeat the arguments made upon the previous appeal, we deem it appropriate to call to the Court's attention considerations which indicate

a lack of authority to impress a lien upon and to sell allotted lands for the purpose of insuring payment of the attorney's fees; since authority exists to reexamine the matter if this Court is so advised. *United States* v. *Fullard-Leo,* 156 F. 2d 756, 757 (C. A. 9, 1946), affirmed 331 U. S. 256 (1947).

The previous opinion recognized that, in view of the Government's interest in the restricted allotment, no lien could be impressed thereon unless Congress had in some way indicated its consent (*Arenas* v. *Preston,* 181 F. 2d 62, 66–67 (C. A. 9, 1950)). And upon the authority of *United States* v. *Equitable Trust Co.,* 283 U. S. 738 (1931), it was found that such consent had been granted by implication. However, inasmuch as the jurisdiction of the court below depended upon a special jurisdictional act waiving the sovereign immunity from suit, whereas the finding of an implied consent in the *Equitable Trust* case was based upon the invocation of the court's jurisdiction by the United States as plaintiff, it is submitted that, for the reasons detailed in our opening brief on the prior appeal (pp. 17–20, 26–27), a finding of consent by implication in the instant case cannot be supported. The principle that legislation is to be construed most favorably to the Indian does not, as the previous opinion seems to indicate, create an exceptional situation but, just as in the case of any other special jurisdictional act waiving the sovereign immunity, a jurisdictional act for the benefit of Indians "is to be strictly construed and may not by implication be extended to cases not plainly within its terms." *Klamath Indians* v. *United States,* 296

U. S. 244, 250 (1935); *Blackfeather* v. *United States,* 190 U. S. 368, 376 (1903); cf. *Shoshone Indians* v. *United States,* 324 U. S. 335, 337 (1945).[6]

Moreover, it is plain that the circumstances here present could not justify a finding of implied consent. In our opening brief (pp. 13–15, 19–26) and in our reply brief (pp. 4–6) on the prior appeal we pointed out many of the circumstances, such as the nature of the restrictions on the allotments, the strong governmental policy to preserve Indian allotments, and the practice of Congress in making specific provisions for the payment of attorneys in suits against the Government, all of which militate against a finding that Congress had impliedly consented that in suits under the 1894 Act the allotments could be impressed with a lien to secure the compensation of attorneys. This Court found these circumstances to be outweighed by the reasoning that, inasmuch as the Indian litigant would most likely be without the means to meet the necessary expenses of suit, "Congress could not have intended to commit the subject to its courts with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction." *Arenas* v. *Preston,* 181 F. 2d 62, 66–67 (C. A. 9, 1950). Reliance was primarily placed upon *United States* v. *Equitable Trust Co.,* 283 U. S. 738 (1931) which involved Jackson Barnett, a member of one of the Five Civilized Tribes. But it is clear from contemporary congressional action relating to allot-

[6] The question whether such an exception existed was not raised or discussed by the parties in their briefs on the former appeal.

ments to members of the Five Civilized Tribes that Congress could not have intended to permit the impressment of liens upon and the sale of lands allotted to Indians to assure the payment of attorneys' fees.

While the same general Indian policy applied to the Five Civilized Tribes as to other Indians, those tribes were excluded from the coverage of the 1894 Act and were the subject of separate legislation. One of the allotment problems that arose in allotting the lands of the Five Civilized Tribes was the question whether Choctaw Indians who had remained in Mississippi should participate in the distribution of Choctaw lands in Oklahoma. Many of the Mississippi Choctaws contracted with attorneys to prosecute their claims in consideration of a fee of one-half of their interests in the allotments that might be secured. When the existence of these contracts was brought to the attention of Congress, it was provided by the Act of May 31, 1900, 31 Stat. 221, 237, that "all contracts or agreements looking to the sale or incumbrance in any way of the lands to be allotted to said Mississippi Choctaws, shall be null and void." See *Winton* v. *Amos,* 255 U. S. 373, 380–381, 386–387 (1921). And in 1914, Congress enacted legislation with respect to attorney contracts with all members of the Five Civilized Tribes for compensation for services in prosecuting applications for enrollment as citizens in such tribes, such citizenship being the requisite for an allotment of the tribal lands. By the Act of August 1, 1914, 38 Stat. 582, 601, 25 U. S. C. sec. 86, 18 U. S. C. sec. 439, it was provided that all such contracts were null and void unless the

consent of the United States had previously been given; that the receipt of any moneys from any applicants for citizenship was a criminal offense; and that lands allotted to such applicants should not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which the particular allotment could be lawfully alienated. Again, in authorizing per capita payments to members of the Five Civilized Tribes, Congress consistently declared that such payments would be exempt from any lien for attorney fees. Act of August 1, 1914, 38 Stat. 582, 599, 601; Act of May 18, 1916, 39 Stat. 123, 146–147; Act of May 25, 1918, 40 Stat. 561, 580; Act of June 30, 1919, 41 Stat. 3, 22. Thus, Congress has, whenever occasion has required any intercession, steadfastly declared that, at least as far as members of the Five Civilized Tribes are concerned, the allotments were not to be used to compensate attorneys for their services in securing the lands for the Indians. Thus, it is clear that while the award of attorneys' fees under the peculiar circumstances of the *Equitable Trust* case did not violate any policy of Congress, the award of such fees for services in securing an allotment is expressly contrary to that policy.

Adoption of the Government's position does not mean that attorneys who have successfully prosecuted allotment claims of indigent Indians are without hope of receiving compensation. In those cases where adjustment cannot be made by the Secretary of the Interior, Congress has always been solicitous that the attorneys obtain relief. By the Act of April 26, 1906,

34 Stat. 137, 140, and the Act of May 29, 1908, 35 Stat. 444, 457, the Court of Claims was given jurisdiction to adjudicate the claims of attorneys for services and expenses incurred in furthering the claims of the Mississippi Choctaws, the judgment to be paid from funds due to such Choctaws as individuals from the United States. See also Act of March 3, 1903, 32 Stat. 982, 994–995 (providing for payment to attorney for loyal Creeks from the moneys awarded); Act of July 1, 1902, 32 Stat. 641, 650 (providing for payment of attorneys of Chickasaw freedmen from the Treasury); Act of June 21, 1906, 34 Stat. 325, 340 (authorizing Court of Claims to determine claims of attorneys for intermarried whites of Cherokee Nation and to designate funds held by the United States from which payment should be made); Act of May 29, 1908, 35 Stat. 444, 451 (authorizing Court of Claims to determine claims of attorneys for services to Choctaw and Chickasaw freedmen in allotment claims). And on many occasions in providing for cash payments in lieu of allotments or for per capita payments to members of the Five Civilized Tribes, Congress has authorized the Secretary of the Interior to investigate the claims of attorneys and to allow compensation from the funds. Act of August 1, 1914, 38 Stat. 582, 600; Act of May 18, 1916, 39 Stat. 123, 146–147; Act of May 25, 1918, 40 Stat. 561, 579–580; Act of June 30, 1919, 41 Stat. 3, 22. Indeed, there are many instances where Congress has made appropriations for payment to attorneys or to reimburse persons who had paid attorneys for Indians in a wide variety of litigation. See Act of May 31, 1900, 31 Stat. 221,

241; Act of May 27, 1902, 32 Stat. 245, 267; Act of March 3, 1903, 32 Stat. 982, 1000–1001; Act of March 3, 1905, 33 Stat. 1048, 1063; Act of June 30, 1906, 34 Stat. 634, 656; Act of March 3, 1911, 36 Stat. 1058, 1065; Act of August 24, 1912, 37 Stat. 518, 533.

Likewise, in cases arising under the 1894 Act Congress has not been hesitant in making arrangements for payment to attorneys who successfully prosecuted claims for allotments on behalf of Indians who were not able to pay the attorneys with personal funds. By the Act of June 30, 1913, 38 Stat. 77, 98, Congress appropriated funds to reimburse the attorneys, who had been engaged in *Sully* v. *United States,* 195 Fed. 113 (C. C. S. D., 1912) and *Drapeau* v. *United States,* 195 Fed. 130 (C. C. S. D., 1912), for their out-of-pocket expenses. And later by the Act of August 11, 1916, 39 Stat. 509, which authorized retroactive per capita payments to the Indian claimants in those cases, it was provided that the Secretary of the Interior might determine the compensation due to the attorneys for their services and make payment out of the per capita payments. By the Act of July 6, 1912, 37 Stat. 1246, the Secretary of the Interior was authorized to determine fees for the attorney for minor Cascade Indians in their allotment suit, payment to be made out of any money standing to the credit of the minors, and later Congress appropriated federal funds to pay the attorney, the Government to be reimbursed out of the first moneys from the leasing or sale of the minors' lands. Section 23, Act of June 30, 1913, 38 Stat. 77, 100. More recently, by the Act of March 9, 1940, 54 Stat. 48, Congress has appropriated

moneys to compensate attorneys who successfully prosecuted allotment claims of certain Quinaielt Indians (*Halbert* v. *United States,* 283 U. S. 753 (1931)), the amount paid to be reimbursed to the United States out of funds accruing from a future sale of timber or the allotments. See H. Rept. No. 1771, 75th Cong., 3d sess.; H. Rept. No. 526, 76th Cong., 1st sess.; S. Rept. 107, 76th Cong., 1st sess.

All these cited instances serve to emphasize that Congress, rather than impliedly consenting by the 1894 Act that the court impose a lien upon and sell the allotments to compensate attorneys and pay other expenses of litigation, has reserved to itself and the executive departments full control over the restricted allotments and has adopted a policy of arranging compensation for attorneys on an individual case basis after considering each case on its own merits. In consideration of such cases, Congress has never directed a forced sale of an allotment to satisfy claims of attorneys, but at most, if the Secretary of the Interior was not holding any funds of the allottee, has in effect recognized the existence of an unenforceable lien, and authorized payment to the attorneys out of income or the proceeds from the sale of the allotment in normal course. This policy of Congress, conforming as it does to its policy of preserving Indian allotments, is fair to the Indians and to attorneys for indigent Indians. It assures appellee attorneys that it is possible to obtain reasonable compensation for their services through the Secretary of the Interior or Congress, and no reason is apparent why they should not fairly be left to such procedures. In any event,

it is not for the courts "to determine questions of Indian land policy." *Arenas* v. *United States,* 322 U. S. 419, 432 (1944).

II

The values found by the district court for the Indian's interest in the various parcels of the allotments are excessive and not supported by competent evidence

On the prior appeal this Court directed that in fixing the dollar value of the services rendered the court below should "determine the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration." *Arenas* v. *Preston,* 181 F. 2d 62, 67 (C. A. 9, 1950). The district court found (Finding VIII, R. 70–71) that the reasonable market value of the Indian's interest in the allotted lands was a total of $412,000, and also found (Finding IX, R. 71) that the market value of the fee simple title of the allotted lands was the same as the reasonable value of the Indian's interest. Neither finding is supported by the evidence.

That these findings are directly contrary to the evidence is especially clear with respect to the 2-acre lots in Section 14 and the 5-acre lots in Section 26. As to these lots the findings as to value of the Indian's interest under the trust patent are in exactly the same amounts as the highest testimony as to the value of the fee simple title, namely, $40,000 for each of the 2-acre lots and $66,000 for each of the 5-acre lots (R. 70–71, 154–156, 401, 406–407; Petitioners' Exhibit

No. 14, p. 15). However, all the witnesses were agreed that the value of the Indian's interest under the trust patent was substantially less than the value of the fee title (R. 184–186, 194, 199, 594–595, 606). Appellees' witnesses testified that the value of the Indian's interest was 40% less than the fee value (R. 185, 194, 199), while according to appellants' witnesses the difference would be much greater (R. 594–595, 606). Hence, it is plain that the findings as to value are greatly in excess of the evidence and are therefore erroneous. Since these findings were the basis for the award of compensation for services rendered, it is likewise clear that the award of fees is erroneous and must be reversed.

It is true that witness Gallagher testified that the values of the fee title and the trust patent interest would be the same if it were assumed that the trust period would expire in May 1952 (R. 184). However, this opinion, based as it is upon an improper assumption, cannot be deemed to support the findings as to value. As appellees acknowledge (R. 234), the trust period may be further extended by the President in his discretion. 25 U. S. C. secs. 348, 391. And it has been customary that trust periods be further extended. 25 C. F. R., Appendix, pp. 367–370. From 1934 through 1951, these extensions have been accomplished through general Executive Orders issued annually, and have usually been for an additional 25-year period. 25 C. F. R., Appendix, p. 370; Executive Order No. 10027, January 6, 1949, 14 F. R. 107; Executive Order No. 10091, December 14, 1949, 14 F. R. 7513; Executive Order No. 10191, December

13, 1950, 15 F. R. 8889. Acting under a delegation of authority from the President, the Secretary of the Interior has extended for one year all trust patents due to expire in 1952. 17 F. R. 799. It is plain, therefore, that the only portion of Gallagher's testimony as to the value of the trust patent interest that has any materiality here is his opinion that, if the President had the power to extend the existing trust period for as much as ten years, the value of the trust patent would then be 40% less than the fee value (R. 184–186, 194).

Thus, it is clear that, although professing to follow this Court's direction that the amount of compensation be determined in consideration of the value of the Indian's interest under the trust patent, the district court has determined the amount of compensation due to appellee attorneys in the light of the value of the full fee title of the allotted lands. It cannot be disputed that the trust patent value is substantially less than the fee value, so that even if it be assumed that the benefit to the Indian is to be measured by the value of his trust patent interest, the award is patently excessive. But in this case the discrepancy between the fee title value and the thing recovered for the Indian in the litigation is even greater than the difference between the values of the trust patent and the fee. The actual benefit to the Indian in this case is clearly less than the value of the trust patent interest. It was never questioned that Lee Arenas was a duly enrolled and recognized member of the Palm Springs Band (Record in No. 11195, p. 45), so that there never was any question

that he would be entitled to an allotment if allotments were to be made on the reservation. The ultimate issue to be determined in the allotment proceeding was whether the United States should hold title to the lands involved in trust for the tribe or Lee Arenas. The result is that in return for an allotment in severalty, the Indian has given up his interest in common to the tribal lands allotted or to be allotted to other members of the band as a result of his successful suit under the 1894 Act. Obviously, the actual benefit to the Indian is no more than the benefit accruing to a plaintiff in an ordinary partition suit. In such cases, the benefits are held to be too slight or speculative to support any award of attorney fees measured by the value of the thing recovered. *Fletcher* v. *Coomes,* 285 Fed. 893, 896–897 (C. A. D. C., 1922); cf. *Thomas v. Peyser,* 118 F. 2d 369, 371 (C. A. D. C., 1941).

We have demonstrated, *supra,* pp. 31–33, that the findings of trust patent value of the 2-acre and 5-acre lots are contrary to the evidence in that the findings are in the exact amounts of the highest testimony as the value of the fee simple title, which all the witnesses agreed was substantially greater than the value of the trust patent interest. It is acknowledged that the findings of values of $100,000 for each of the 40-acre parcels in Section 26 are supported by the testimony of appellees' witnesses Gallagher and Beckley, who estimated that the fee simple values of these two parcels were in the amount of $455,000 and $380,000, respectively (R. 198; Petitioners' Exhibit

No. 14, p. 15).[7] However, it is submitted that the opinions of these witnesses were not competent evidence of value and should not have been considered by the court.

These witnesses reached their estimates of value chiefly, if not entirely, by an arithmetical process of averaging the values of lands in sections adjacent to Sections 14 and 26 (R. 116–117, 199–200, 424, 641, 649–651; Petitioners' Exhibit No. 14, pp. 19–20, 22), that is, they first determined values for all properties, chiefly small lots, in the well-developed sections adjacent to the Indian sections, added the values for properties in the sections to obtain the total value of each section, divided the sum of the section values to obtain the value of an average section, discounted such average value to obtain the value of the Indian sections, and then divided this result by 640 to get the average value per acre in the Indian sections. Such an arbitrary method of appraisal is bad enough in itself to warrant a finding that the resulting estimates were utterly incompetent. But in the instant case the use of other incompetent factors makes such a process of even less probative value. In determining the values of properties in adjoining sections, the

[7] According to these witnesses the values of the trust patent interest would be 40% less, or approximately $273,000 and $228,000, respectively, a total of $501,000 for the 80 acres (R. 184–186, 194, 199). The court found a value of $200,000 for the 80 acres, while the highest testimony by any witness for appellants was $140,000 as the fee value of the 80 acres (R. 576). Applying Gallagher's estimate of a 40% depreciation would establish a trust patent value of $84,000 for the 80 acres as the highest estimate by the witnesses, excluding Gallagher and Beckley.

witnesses relied chiefly upon listings and assessed valuations. (R. 174–177, 199–200, 640–641); actual sales were of only incidental consideration (R. 416–417). They took the assessed valuations not only of land, but of improvements as well (R. 176–177, 200), and multiplied such assessed valuations by five to determine value (R. 175–176). Under this unusual method of valuation, building lots in well-developed areas would be no more valuable than raw acreage; an acre on a main highway would be no more valuable than an interior acre with poor access; and an acre improved with substantial buildings would be no more valuable than vacant land. The absurdity of such a method of valuation is readily apparent, and the opinions based upon such a method should have been stricken upon appellants' motion (R. 40–41, 63–65; see R. 66, 214). *Atlantic Coast Line R. Co.* v. *United States,* 132 F. 2d 959, 963 (C. A. 5, 1943); *San Diego Land & Town Co.* v. *Neale,* 88 Cal. 50, 62, 25 Pac. 977, 980 (1891).

Indeed, the opinions of appellees' witnesses are subject to still further attack. In estimating the value of the allotted lands here involved they assumed, not only that these lands would be freed of restrictions, but also that all of the Indian lands in the section would be similarly without restrictions against alienation and that the unsightly conditions would be cleaned up so that the entire section could be developed along the lines in the adjoining sections (R. 154–162, 167, 199, 411–412, 413–415). The extremely speculative nature of this assumption is evident from the rejection over a period of years of

various plans looking to the development of all of Section 14. See *United States* v. *Arenas,* 158 F. 2d 730, 741–745. They also assumed that variances in the zoning regulations would be made to permit the highest and best use of the land (R. 165–166, 201, 408, 421). Obviously, such considerations have no place in reaching an opinion as to present market value. They result in a determination of value not of the property involved, but of the property as it might be in the unascertainable future. Although it is proper to consider all possible uses of the property, such consideration must be limited to the extent that the availability and adaptability of the property for other purposes would affect present market value, and the mere potentialities may not be considered as having a present existence. *Olson* v. *United States,* 292 U. S. 246, 255 (1934); *Long Beach City High School Dist.* v. *Stewart,* 30 Cal. 2d 763, 766–768, 185 P. 2d 585, 586–589 (1947); *Los Angeles* v. *Geiger,* 94 Cal. App. 2d 180, 190–191, 210 P. 2d 717, 724 (1949).

Thus, it is plain that the opinions of Gallagher and Beckley, based as they were upon improper considerations, were of no probative value, as is further evidenced by the fact that neither witness could cite a single instance of a sale of acreage in the Palm Springs area that would support their fantastic estimates of value (R. 177–181, 202–204, 426–428). Clearly, their opinions should have been stricken. And without such opinions there is no evidence to support the court's findings of value.

III

The district court erred in denying appellants' motion to amend findings of fact, conclusions of law and judgment to provide for attorney fees measured by a percentage of the value of the allotments up to, but not exceeding the amount awarded

In this case the expert testimony as to the value of the allotted lands ranged from $50,000 to $1,047,000 (R. 595; Petitioners' Exhibit No. 14), and even the court's finding of a value of $412,000 (R. 71) is greatly in excess of appellants' highest testimony of $245,000 as the fee value (R. 575) and $87,800 as the trust patent value (R. 433).[8] Indeed, the $90,000 award of attorney fees exceeds the highest estimate by appellants' witnesses as to trust patent value. Thus, if it develops that the valuations of the trust patent interest by appellants' witnesses are correct, the result would be that the attorneys would receive more in fees than the value of the thing recovered, i. e., the Indian's interest in the lands under the trust patent. Obviously, such a result is not in accord with an equitable determination of attorney fees on a *quantum meruit* basis. And even if the value of the unrestricted fee is deemed the material factor, on the assumption that appellants' testimony as to value is more nearly correct, similar inequities would be apparent. According to the testimony of appellants' most liberal witness, the present fair market value

[8] The court below ruled that the allotted lands should be valued as of the time of trial in 1951 (R. 435). Inasmuch as the 1951 valuations of appellants' witness would be 10% less than the above testimony (R. 436–437), the discrepancy would be even greater than indicated.

of the fee title would be approximately $220,500 (R. 436–437, 575). It could reasonably be expected that the proceeds of any sale would be considerably less than this figure because of the forced nature of the sale. The net proceeds would be further reduced by the expenses of sale, so that, after payment of the $90,000 fees, it is possible that the allottee would realize little or nothing and could even end up without any of his allotment and still be in debt to appellee attorneys.

In view of these possibilities, appellants, as an alternative to a motion for new trial, filed a motion to amend the findings of fact, conclusions of law and judgment to provide for compensation in the amount of 22½% of the value of the alloted lands up to but not exceeding $90,000, in lieu of a flat fee of $90,000 (R. 80–83, 449–450). In other words, the recovery would be $90,000 or 22½% of the value of the allotted lands, whichever was the lesser. The court below was impressed with the apparent equity of the proposed amendment and apparently would have granted the motion if it had not been for the thought that such amendment was foreclosed by this Court's mandate (R. 85–86, 454–455, 457–462). It is clear that in so thinking the court below misconstrued the mandate.

The proposed amendment is in no way inconsistent with the mandate and in fact conforms to this Court's direction (181 F. 2d at p. 67): "The chancellor will of course, see to it that no unconscionable fee or extravagant expenditure will be allowed and will protect the allotment from being affected in the slightest unnecessary manner or degree." On the prior appeal

this Court disapproved the percentage award because it was apparently based upon a contract which could not be of any effect in view of the governmental interest, and because it was impossible to determine the fairness of the award without any finding as to the value of the allotment (181 F. 2d at p. 67). The percentage award was also vitiated by the fact that the judgment could not be satisfied and the lien discharged without first selling the property. Judgment in the alternative, a percentage of value or a flat sum, whichever is the lesser, would meet all of these objections and would at the same time obviate the possibility of an unconscionable result. Clearly, the granting of the requested amendment was within the power of the district court, or at least is within the power of this Court. And there can be no question as to the equity of the amendment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed.

Respectfully,

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